

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration of the
Cross-Section of Slough Lake
(3-368P), by WE Fest, Inc., Without
a Permit From the Commissioner of
Natural Resources

RECOMMENDED ORDER
GRANTING SUMMARY DISPOSITION

The above-entitled matter is before the undersigned Administrative Law Judge on the Motion for Summary Judgment requested by the Staff of the Minnesota Department of Natural Resources.

Carl E. Malmstrom, Thorwaldson, Quam, Beeson, Malmstrom & Sorum, Attorneys at Law, P.O. Box 1599, 1105 Highway 10 East, Detroit Lakes, Minnesota 56502-1599, appeared on behalf of WE Fest, Inc. (hereinafter "WE Fest"); Michelle E. Beeman, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Staff of the Minnesota Department of Natural Resources (hereinafter also referred to as the "Department").

The Judge heard argument on the Motion for Summary Disposition on March 14, 1995. The record closed on this Motion on March 30, 1995, the date of receipt of the last affidavit submitted by WE Fest.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the recommendations contained herein. The final decision of the Commissioner of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Rodney Sando, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155.

Based upon all the files, records and proceedings herein, and for the reasons set out in the Memorandum attached hereto, it is RECOMMENDED that the Commissioner of Natural Resources issue the following:

ORDER

1. That the Motion for Summary Disposition is hereby GRANTED;
2. That WE Fest shall remove all fill material placed below the OHW of Slough Lake consistent with the Commissioner's Restoration Order issued on May 25, 1994; and
3. That WE Fest's application for a public waters work permit to lay fill materials below the OHW of Slough Lake is DENIED.

Dated this 3rd of May, 1995.

/s/ Allen E. Giles

ALLEN E. GILES
Administrative Law Judge

APPLICABLE STATUTES AND RULES

Minn. Stat. § 103G.005, subd. 14 provides in part as follows:

Ordinary high water level. "Ordinary high water level" means the boundary of waterbasins, watercourses, public waters, and wetlands, and:

(1) the ordinary high water level is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial.

Minn. Stat. § 103G.245 provides in relevant part as follows:

. . . [T]he state, a political subdivision of the state, a public or private corporation, or a person must have a public waters work permit to:

. . .

(2) change or diminish the course, current, or cross-section of public waters, entirely or partially within the state, by any

means, including filling, excavating, or placing of materials in or on the beds of public waters.

Minn. Rules pt. 6115.0190, subp. 3 provides in part as follows:

Subpart 2. Scope. Filling as used in this part involves placement of unconfined or loosely confined materials in protected waters.

Subpart 3. Non-permitted placement. Placement shall not be permitted in the following cases:

- A. To achieve vegetation control;
- B. To create upland areas, except where expressly provided herein;

...

F. To construct a roadway or pathway, or create or improve land accesses from peripheral shorelands to islands, or to facilitate land transportation across the waters; however, where a project is proposed by a federal, state, or local government agency and this provision would prevent or restrict the project, or create a major conflict with other public purposes or interests, the Commissioner may waive this provision provided:

- (1) there is no other feasible and practical alternative to the project that would have less environmental impact; and
- (2) that the public need for the project rules out the no-build alternative;

...

MEMORANDUM

WE Fest owns or leases land in Sections 9 and 16 in Lakeview Township in Becker County, Minnesota, which is utilized as an outdoor concert venue for special events, including the annual WE Fest country music festival held each August. WE Fest grounds, and neighboring lands, are used for campgrounds and parking lots for the tens of thousands of visitors of the festival. Situated within the WE Fest grounds is Slough Lake, a protected public water of the State of Minnesota as defined in Minn. Stat. § 103G.005, subd. 15 (1994). The ordinary high water level ("OHW") of Slough Lake is 1336.0 NGVD 1929.

For the 1992 WE Fest event, concert organizers opened an additional campground area and a "day parking lot". Both the new campground area and the day parking lot are located on the east side of Slough Lake. The main concert area and most of the other campground areas are located on the west side of Slough Lake. In order to provide concertgoers safe access from the new campgrounds and day parking lot, WE Fest organizers proposed to rebuild a previously existing private road, the "Slough Lake Road". The Slough Lake Road transected Slough Lake wetland areas. The Slough Lake Road was in disrepair and had so eroded as to require sand and gravel fill to rebuild the road. The roadway was above the OHW of Slough Lake for most of its length (approximately 200 feet) except for several small beaver holes and a large section (approximately 70-80 feet) where the road had eroded.

On July 8, 1992, WE Fest President Jeff Krueger met with DNR Area Wildlife Manager, Earl Johnson, and Area Hydrologist Bob Merritt to discuss WE Fest's proposal to reconstruct the Slough Lake Road. WE Fest proposed to upgrade the roadway to provide access to the main concert area for people camping and parking in the new campgrounds and day parking lot and to provide an additional east-west access for emergency and service vehicles. Messrs. Krueger, Merritt and Johnson discussed the need for a DNR public waters work permit for some of the proposed work.

On July 8, 1992, Merritt and Johnson identified the old road alignment of the Slough Lake Road through the northcentral portion of Slough Lake. They found that the road did not extend from bank to bank, the roadway appeared to have eroded approximately midway across the wetland. This area was below the OHW of Slough Lake and would require sand and gravel fill to raise it to the level of the rest of Slough Lake Road. Mr. Krueger proposed to upgrade the entire length of Slough Lake Road, including those areas below the OHW of Slough Lake. Mr. Krueger informed Mr. Merritt and Mr. Johnson that he wished to have the work completed within one month, by August 7, 1992, in time for the annual WE Fest concert. Mr. Krueger was informed at that time that one month was an inadequate time for review of WE Fest proposals for rebuilding the road. Mr. Krueger was informed that a public waters work permit was required to fill a portion of the wetland to extend the previously existing road.

On July 14, 1992, WE Fest submitted an application to the DNR for a public waters work permit. In that application, WE Fest stated, in part, as follows:

...

We propose to rebuild a road that previously connected two parcels of farmland as indicated on the enclosed map. That portion of the road that has not eroded need only be cleared of small brush and have one foot of soil added to the top to more clearly define it. The road would be 33 feet wide.

The remaining 75 feet of proposed road which would also be 33 feet wide must fjord a narrow channel of wetland extending from the Southwest corner of Slough Lake. We are requesting permission to lay in three feet of gravel and sand, over two 36-foot culverts to build up this section of the road.

. . .

The proposed road would connect an existing campground used five days per year during the WE Fest, to a recently purchased parcel of land, which is being developed for camping, and day parking. This road will allow our patrons to safely walk from the concert site to the new campground and parking lot.

Approximately three weeks after filing the application, WE Fest rebuilt Slough Lake Road, before the DNR responded to the permit application. On or before August 7, 1992, WE Fest, or its agents, placed fill in the bed of Slough Lake without a DNR public waters work permit. A road approximately 15 feet wide spanned the entire wetland. On May 19, 1993, DNR staff conducted an OHW survey for Slough Lake, a borehole soil survey, and a topographic survey of the completed Slough Lake Road. The three surveys determined that the OHW of Slough Lake is 1336.0 feet NGVD 1929. Approximately 1840 square feet of wetland surface area below the OHW of Slough Lake had been covered by the reconstruction of Slough Lake Road.

On May 25, 1994, the Commissioner of Natural Resources issued an Order requiring that WE Fest restore that portion of the Slough Lake wetland that was unlawfully filled. The Commissioner's Order was entered without a hearing. WE Fest requested a hearing on this matter.

Summary Judgment

The Department has moved for summary judgment on the basis of its claim that there is no genuine issue as to any material fact and as a matter of law the Department is entitled to judgment in its favor. The Department argues that WE Fest placed fill below the OHW of Slough Lake without a permit in violation of Minn. Stat. § 103G.245 which required that WE Fest obtain a public waters work permit prior to the time that it completed the Slough Lake Road. Next, the Department argues that it was required to deny the application for a public waters work permit because the Water Law prohibits issuance of a permit for the work proposed by WE Fest. The Department argues that summary judgment is appropriate because there is no material factual dispute on either the Water Law violation or the permit denial.

WE Fest argues that summary judgment is inappropriate and that there are material contested facts requiring that this matter go to trial. WE Fest argues that no public waters work permit was required for improvement of the already existing road, and alternatively, if a permit was required, a trial must be held to consider contested material facts relating to public need and whether reasonably feasible alternatives to the Slough Lake Road exist.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. Rule 56.03. Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rules pt. 1400.5500 K.

In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case that no material issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire & Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM MidAmerica Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minnesota Rules of Civil Procedure Rule 56.05. Id. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1980). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

Upon review of this matter, the Judge has concluded that summary judgment is appropriate. Summary judgment is appropriate because WE Fest has failed to establish any genuine issue of material fact with respect to the Commissioner's Order requiring WE Fest to restore the wetland or the Commissioner's denial of WE Fest's request for a permit to work in public waters.

The Public Waters Violation

WE Fest does not challenge the facts giving rise to the violation of Minn. Stat. § 103G.245. WE Fest admits that it placed sand and gravel below the OHW of Slough Lake without a permit. In fact, WE Fest does not challenge that it placed approximately 1,840 square feet of sand and gravel fill below the OHW of Slough Lake in order to make the improvements to the Slough Lake Road. Any person seeking to change or diminish the course, current or cross-section of public waters by any means, including filling, must have a public waters permit from the DNR pursuant to Minn. Stat. § 103G.245 (1994). Because WE Fest placed the fill on the lake bed without a public waters work permit, it violated Minn. Stat. § 103G.245 (1994). There are no material facts in dispute with respect to this issue.

Although WE Fest does not dispute the facts, it does challenge the Section 103G.245 violation on the basis of a legal issue: WE Fest asserts that because it was making an improvement or rebuilding an already existing road, no public waters work permit was needed. WE Fest cites no legal authority for this assertion other than the bare claim that it is unreasonable to require such a permit when the road in question is a private road connecting two private parcels of property. However, Minn. Stat. § 103G.245 requires a public waters work permit for any work in protected public waters and does not make the exception for private road improvements suggested by WE Fest. WE Fest's legal assertion is contrary to statute and has been rejected by the Judge.

Denial of the Application

WE Fest's application for a public waters work permit to rebuild and improve the Slough Lake Road was denied by the Department. The improvements proposed in the application would have authorized WE Fest to lay approximately three feet of sand and gravel along approximately 80 feet where the previously existing road had eroded. The application was denied because granting the permit would allow WE Fest to "create upland areas" or would authorize WE Fest "to construct a roadway or pathway . . . to facilitate land transportation across the waters. . . ." Pursuant to Minn. Rules pt. 6115.0190, subp. 3, filling a public water for these reasons are expressly prohibited. WE Fest does not challenge that its application requested authority to establish a roadway or pathway to facilitate land transportation across Slough Lake. The Department appropriately denied the permit based upon the standards identified in Minn. Rules pt. 6115.0190, subp. 3. There are no genuine contested facts that would require a trial on this issue.

WE Fest argues that summary judgment is inappropriate because there are material contested facts relating to public need and feasible alternatives to the reconstructed Slough Lake Road. WE Fest suggests that at a trial it would demonstrate through the testimony of witnesses that there is a public need (primarily public safety) for the Slough Lake Road and that there are no practical feasible alternatives to the reconstructed Slough Lake Road. WE Fest makes this argument apparently based on Minn. Rules pt. 6115.0190, subp. 3(f), which states in relevant part:

. . . Where a project is proposed by a federal, state or local government agency, and this provision would prevent or restrict the project, or create a major conflict with other public purposes or interests, the Commissioner may waive this provision provided: (1) there is no other feasible and practical alternative to the project that would have less environmental impact; and (2) that the public need for the project rules out the no-build alternative. (Emphasis added.)

This rule provision is inapplicable to this case. The Slough Lake Road improvement has not been proposed by a state, federal or local governmental agency. The Slough Lake Road improvement is a private project, relating to a private road connecting two parcels of real estate privately owned. The cited rule provision has no application to the issues in this case.

Finally, WE Fest argues that it disagrees with several of the Findings made in the Restoration Order issued on May 25, 1994. WE Fest appears to disagree with Findings 5, 9, 10, 19, 23 and 25. In light of WE Fest's failure to challenge that it placed fill below the OHW of Slough Lake, its disagreement with these Findings would not raise a genuine factual issue that would affect the outcome of this proceeding.

AEG